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MICHAEL RODAK, JR., CLERK

## APPENDIX

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In The  
**Supreme Court of the United States**

October Term, 1977

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No. 78-201

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JOHN B. GREENHOLTZ, Individually, and as Chairman,  
Nebraska Board of Parole; EUGENE E. NEAL, CATH-  
ERINE R. DAHLQUIST, MARSHALL M. TATE, and  
EDWARD M. ROWLEY,

*Petitioners,*

vs.

INMATES OF THE NEBRASKA PENAL AND COR-  
RECTIONAL COMPLEX, RICHARD C. WALKER,  
WILLIAM RANDOLPH, RICHARD J. LEARY, ROB-  
ERT L. GAMRON, FREDERICK L. GRANT, WAYNE  
GOHAM, and CHARLES LAPLANTE,

*Respondents.*

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— 0 —

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED AUGUST 4, 1978**

**CERTIORARI GRANTED OCTOBER 2, 1978**

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# RELEVANT DOCKET ENTRIES

Date	No.	
1972		
Nov. 13	1	Complaint.
1973		
Nov. 29	64	Memorandum and Order (AGS) that Action shall continue as a Class Action with Robert McDonnell representing that Class, etc.; that Defendants' Motion to Strike allegations regarding removal of John Greenholtz as a member of the Board is granted etc. Copy mailed to Counsel of Record.
1976		
Aug. 11	170	Plaintiffs' Amended Complaint.
Aug. 11	171	Motion to Designate New Representative Parties For Class of Persons alleging Denial of Due Process by Richard Walker, William Randolph and Richard Leary and Robert L. Gamron.
Aug. 30	180	Defendants' Answer to Amended Complaint.
1977		
Feb. 16	196	Order (AGS) that Motion (filing No. 171) is Granted—that case is set for trial at a date after 4-15-77. Copies mailed to Counsel of Record.
May 31	200	Courtroom Minutes—trial before Judge Schatz—Case submitted.
June 17	205	Motion to Designate New Representative Parties for Class of Persons alleging Denial of Due Process.
June 17	208	Order (AGS) designating additional Class Representatives. Copies mailed to Counsel of Record.
Oct. 21	210	Memorandum Opinion.

Oct. 21 211 Order (AGS) that Defendants will implement and put into effect within 60 days from this date procedures that will safeguard the due process rights of the plaintiff class, etc.  
Copies mailed to Counsel of Record.

Nov. 7 212 Defendants' Notice of Appeal to United States Court of Appeals.  
Copy mailed to Brian K. Ridenour, Counsel, and to Jack Fitch, Court Reporter, 8015 U. S. Courthouse, 215 North 17th Street, Omaha, Nebraska 68101.

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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No. 77-1889

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM and CHARLES LAPLANTE,

*Appellees,*

vs.

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

*Appellants.*

Appeal from the United States District Court  
for the District of Nebraska

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Submitted: February 14, 1978

Filed: May 18, 1978

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Before HEANEY and STEPHENSON, Circuit Judges,  
and BECKER,\* District Judge.

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STEPHENSON, Circuit Judge.

The defendants-appellants, members of the state of Nebraska Board of Parole (Board), appeal from the decision of the district court<sup>1</sup> in this class action suit arising under 42 U. S. C. § 1983. The district court held that the plaintiffs-appellees, inmates of the Nebraska Penal Complex (inmates), had been denied procedural due process by the Board in the Board's consideration of the inmates for suitability for parole.

This case raises the question of whether the due process clause of the Fourteenth Amendment to the United States Constitution extends to parole release determinations, and if so, whether the safeguards currently available under applicable Nebraska law are constitutionally adequate. We affirm that the due process clause applies to parole release proceedings. With respect to the specific procedural safeguards which the district court found were constitutionally required in such proceedings, we affirm in part, reverse in part, and remand.

The Nebraska Board of Parole consists of five members. The chairman and two members are full-time, and the other two members serve on a part-time basis. Neb. Rev. Stat. § 83-191. Under Nebraska law the Board is

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\*The Honorable William H. Becker, Senior United States District Judge for the Western District of Missouri, sitting by designation.

<sup>1</sup> The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.



charged with the responsibility of determining whether and when an inmate should be released on discretionary parole. Neb. Rev. Stat. §§ 83-192, 83-1,114, 83-1,115. The Board is required by statute to review at least once a year the record of each convicted offender, whether or not eligible for parole, and to meet with him and counsel him concerning his progress and prospects for a future parole. Neb. Rev. Stat. § 83-192 (9). These parole review hearings last an average of five to ten minutes and the inmates are not allowed to present evidence or call witnesses in their behalf.

After the annual parole review hearing, each prisoner is sent a form which informs him whether or not he is to receive a formal parole hearing. If he does not receive a formal parole hearing the reasons for deferral at that time are stated and recommendations are made for correcting the deficiencies. Only those inmates who are eligible for discretionary parole are granted a formal parole hearing, but in some instances eligible inmates did not receive a timely formal parole hearing. Between July 1, 1975, and June 30, 1976, 327 formal parole hearings and 1,645 review hearings were held.

If the inmate is given a formal parole hearing, he is permitted to offer evidence in support of parole, and may be represented by retained counsel. He is not permitted to cross-examine or hear opposition witnesses. If he is denied parole after a formal parole hearing, he is so advised in person and by letter. Generally the letter advises him of the reasons for denial, although eight instances were found between January 1975 and November 1976 in which reasons were not contained in the letter.

Inmates are notified either at the time of their original confinement or at subsequent parole review hearings or formal parole hearings of the month during which their next hearing will be held. This general notification occurs from 30 days to 1 year in advance. Notification of the precise date and hour occurs through posting of such information at the penal complex on the date of the hearing.

In its order and memorandum opinion of October 21, 1977, the district court concluded that parole release proceedings must be conducted in accordance with certain due process requirements and that the Board's procedures failed to comply fully with those required procedures. The court further found that the inmates were not entitled to monetary damages, but did allow them to recover their costs, including reasonable attorney fees under 42 U. S. C. § 1988.

The initial issue confronting this court is whether parole determination proceedings implicate a liberty interest of the inmates within the meaning of the due process clause of the Fourteenth Amendment. We are convinced that it does.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Our inquiry of whether the prohibitions of the Fourteenth Amendment apply begins with the Supreme Court case of *Morrissey v. Brewer*, 408 U. S. 471 (1972), where the Court held that the due process clause was applicable to proceedings resulting in revocation of parole. In *Morrissey*, the Court articulated the proper framework for analysis of the question of whether due process applies in a particular situation.

Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U. S. 254, 263 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U. S. 67 (1972).

*Morrissey v. Brewer*, *supra*, 408 U. S. at 481.

The interest asserted by the inmates in this suit is the present right to be considered for parole in accordance with certain procedural safeguards.<sup>2</sup> Since the state is not required by the Constitution to provide parole for convicted offenders, the inmates' interest is aptly described as a privilege or a matter of grace. However, this distinction is no longer an acceptable basis for determining where the due process clause applies to a governmental action. Chief Justice Burger, speaking for a majority of the Court in *Morrissey v. Brewer*, *supra*, 408 U. S. at 481, stated: "As Mr. Justice Blackmun has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."' *Graham v. Richardson*, 403 U. S. 365, 374 (1971)."

<sup>2</sup> Since it is the manner of parole decision-making, not its outcome, that is challenged, the inmates did not present a complaint of the sort in *Preiser v. Rodriguez*, 411 U. S. 475 (1973), for which the inmates' sole federal remedy is a writ of habeas corpus. See *Wolff v. McDonnell*, 418 U. S. 539, 553-55 (1974); *Bradford v. Weinstein*, 519 F.2d 728, 733-34 (4th Cir. 1974), vacated as moot, 423 U. S. 147 (1975).

In the present case the Board attempts to distinguish *Morrissey* as well as *Wolff v. McDonnell*, 418 U. S. 539 (1974) (due process applies to prison disciplinary proceedings where good time credit may be lost), and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973) (due process applies to probation revocation proceeding), on the basis that those cases involved the loss of a privilege and here we are concerned with a denial of a privilege. That is a distinction without a real difference. *Bradford v. Weinstein*, 519 F.2d 728, 732 and n. 3 (4th Cir. 1974), vacated as moot, 423 U. S. 147 (1975).

[The] present enjoyment of a protectable interest is not a prerequisite of due process. See *Goldsmith v. Bd. of Tax Appeals*, 270 U. S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926) (right of C. P. A. to practice before the Board of Tax Appeals); *Willner v. Committee on Character and Fitness*, 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), and *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (admission to the bar); *Speiser v. Randall*, 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (right to a tax exemption).

*Bradford v. Weinstein*, *supra*, 519 F.2d at 732 n. 3. But see *Brown v. Lundgren*, 528 F.2d 1050, 1052-53 (5th Cir.), cert. denied, 429 U. S. 825 (1976). While the parole applicant's status is not changed by denial of his application, "in the sense that he remains in the same custodial situation as before, the necessity of due process to support the denial is not therefore obviated, for the status remains the same because of a Board determination which if favorable would have changed the status to one of greater liberty." *Childs v. United States Board of Parole*, 511 F.2d 1270, 1280 (D. C. Cir. 1974). The nature of the in-

terest at stake in both parole release and parole revocation is the same—conditional liberty versus incarceration—and thus the Fourteenth Amendment applies to both.

The Board also claims that parole release determinations should be treated differently than the determinations involved in *Morrissey*, *Gagnon*, and *Wolff* because in these latter cases the respective boards were required to make factual determinations and therefore hearings were appropriate. However, Neb. Rev. Stat. § 83-1,114 provides that a prisoner eligible for parole is to be released on parole unless he is found to be unfit for one of the reasons listed in the statute. Thus, the Board's decision of whether to grant parole necessitates a factual determination of whether the statutory criteria are present.

The deprivations which result from revocation of a conditional liberty enjoyed by a parolee described in *Morrissey v. Brewer*, *supra*, 408 U.S. at 481-82, demonstrate the serious effects of denial of parole. Although a parolee is subject to many restrictions not applicable to other citizens, he is able to do a wide range of things available to persons who have never been convicted of a crime. "Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, *supra*, 408 U.S. at 482.

Since the protection of the due process clause extends to parolees, it may not be denied to inmates. While lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, an iron curtain is not drawn between the prisons of this country and the

Constitution. *Wolff v. McDonnell*, *supra*, 418 U.S. at 555-56. Prisoners may not be deprived of life, liberty, or property without due process of law. *Id.* at 556.

The inmates are not the only ones with an interest in seeing that the parole determination proceedings are conducted in accordance with the due process clause. The Supreme Court recognized in *Morrissey v. Brewer*, *supra*, 408 U.S. at 484, that society has a stake in the effort to restore the prisoner to a normal and useful life within the law. Thus, society has an interest in not having release on parole denied because of an erroneous determination. Society has a further interest in treating the prisoner with basic fairness. Fair treatment in parole determinations "will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.*

Of the six circuit courts of appeals which have decided the issue, four have held that the Fourteenth Amendment does apply to parole determination proceedings. *Franklin v. Shields*, 569 F.2d 784, 800 (4th Cir. 1978) (en banc); *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); *Childs v. United States Board of Parole*, *supra*; *United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974). *Contra*, *Scott v. Kentucky Parole Bd.*, No. 74-1899 (6th Cir. Jan. 15, 1975), *vacated and remanded to consider mootness*, 429 U.S. 60 (1976), *on remand sub nom. Bell v. Kentucky Parole Bd.*, 556 F.2d 805 (1977); *Scarpa v. United States Bd. of Parole*, 477 F.2d 278 (5th Cir.) (en banc), *vacated and remanded to consider mootness*, 414 U.S. 809, *dismissed as moot*, 501 F.2d 992 (5th Cir. 1973).



The Supreme Court has not decided the exact question before us of whether a prisoner's interest in prospective parole is an interest to be afforded protection under the due process clause of the Fourteenth Amendment. It must be acknowledged that there are indications both ways in recent Supreme Court opinions. *See discussion, Williams v. Ward*, 556 F.2d 1143, 1157-58 (2d Cir. 1977), *cert. dismissed*, — U. S. —.

The Board primarily relies on the companion cases of *Meachum v. Fano*, 427 U. S. 215 (1976), and *Montanye v. Haymes*, 427 U. S. 236 (1976), for its contention that parole determinations do not implicate the Fourteenth Amendment. In *Meachum*, the Supreme Court held that the due process clause did not entitle a prisoner to a hearing when he is transferred from one prison to another, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events.

We are not persuaded that the holdings of those cases are applicable to the present case. First, *Meachum* involved a transfer only from one prison to another, albeit with less favorable conditions, while here the Board's determination results in either conditional liberty or incarceration. Second, the holding of *Meachum* expressly excludes situations where a right was created by state law. The inmates' interest in this case is the right to be considered for parole, a right created by Nebraska law.

In *Wolff v. McDonnell*, *supra*, 418 U. S. at 558, the Court held that a person's liberty interests may be protected by the Fourteenth Amendment even when the liberty itself is a statutory creation of the state. The Court

found that where the state had created a statutory right for a prisoner to have his sentence shortened for good conduct, and also specified that it was to be forfeited only upon serious misbehavior, the prisoner's interest was within the liberty protected by the Fourteenth Amendment. Therefore, we must examine the Nebraska statutes governing parole release determinations to ascertain if they create a liberty interest.

Under Nebraska law, every committed offender is eligible for parole upon completion of his minimum term less reductions granted for good conduct. *See* Neb. Rev. Stat. §§ 83-1,105, 83-1,110. The Board of Parole has the duty to determine the time of release on parole of committed offenders eligible for such release and to fix the conditions of parole. Neb. Rev. Stat. § 83-192. The Board is further authorized to issue subpoenas, compel the attendance of witnesses, and the production of documents, and to administer oaths and take testimony. Neb. Rev. Stat. § 83-195.

Every committed offender is entitled to a hearing within 60 days before he is eligible for parole and when parole is not granted the Board is required to provide written notification of the reasons for denial. Neb. Rev. Stat. § 83-1,111. Section 83-1,111 further provides that if parole is denied the committed offender shall receive at least once a year a hearing at which his application is reconsidered. Neb. Rev. Stat. § 83-1,115 lists the items which are to be considered by the Board in making its determination of whether to release a prisoner on parole.



Finally, the Board is directed by Neb. Rev. Stat. § 83-1,114<sup>3</sup> to release an eligible prisoner on parole unless it

3 Neb. Rev. Stat. § 83-1,114 provides in full:

Board of Parole; deferment of parole; grounds.

(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

Continued on next page)

finds that release should be deferred due to one of the reasons specified in the statute. Section 83-1,114 also lists the factors to be considered by the Board in making this determination.

An examination of Nebraska law reveals that the inmates have a right to be considered for parole, and this right is protected by procedural safeguards created by statute. In *Wolff*, where the state created the statutory right of shortened sentences for good behavior, the Supreme Court held such good behavior credits were to be withdrawn only when certain constitutional safeguards were adhered to. It follows that since Nebraska has made

(Continued from previous page)

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup, including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant.

parole an integral part of its penological system and provided that those eligible for parole are to be released on parole unless one of the reasons for denial specified in the statute is found to be present, the authority to deny parole must not be exercised arbitrarily. Neb. Rev. Stat. § 83-1,114 provides the inmates with a justifiable expectation rooted in state law that they will be conditionally released if they meet the statutory standards. Consequently, the Fourteenth Amendment due process clause is implicated. See *Wolff v. McDonnell*, *supra*, 418 U. S. at 557. Compare *Meachum v. Fano*, *supra*, 427 U. S. at 228; *Montanye v. Haymes*, *supra*, 427 U. S. at 242.

We agree with the reasoning of the original panel opinion in *Franklin v. Shields*, 569 F.2d 784, 789-90 (4th Cir. 1977), *rev'd en banc*, 569 F.2d 800 (4th Cir. 1978) (reversed upon the grounds that "the only explicit constitutional requisite is that the Board furnish to the prisoner a statement of its reasons for denial of parole"), where it was stated that:

Since the [state] statutes contemplate that a prisoner who has satisfied all the requirements for parole will be conditionally released, the Board's investigation and review are crucial. A prisoner has much at stake in properly conducted parole proceedings, for they may result in his conditional freedom. If the proceedings are flawed—even unintentionally and in good faith, through reliance on incomplete or incorrect information—they may add years to a prisoner's confinement. Consequently, the accuracy and the sufficiency of the information the Board obtains in its investigation, which the statutes require, can have a decisive effect on parole. Also, whether the Board's review is full and fair, as contemplated by the statutes, may be a determinative factor in the grant

or denial of parole. Therefore, we hold that the statutes governing the manner in which a prisoner shall be considered for parole confer on the prisoner an interest in liberty. [Footnote omitted.]

In summary, we find that a prisoner in Nebraska has a statutory right to fair parole consideration. Because this right involves the prisoner's liberty interest, the inmate's right to consideration for parole is an aspect of liberty to which the protection of the due process clause extends. Therefore, the minimum requirement of procedural due process appropriate for the circumstances must be observed.

Having concluded that the due process clause is applicable to parole release proceedings, the question remains how much process is due. In this inquiry we are guided by the Supreme Court's observations in *Morrissey v. Brewer*, *supra*.

It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961).

*Morrissey v. Brewer*, *supra*, 408 U. S. at 481. This balancing test was further refined in *Mathews v. Eldridge*, 424 U. S. 319, 334-35 (1976). The Court stated that:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected

by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

The inmates' interest is the avoidance of arbitrary denial of parole when all of the requirements for release are satisfied. This is indeed a grievous loss. Although the severity of the loss is not a factor in determining whether governmental action implicates the Fourteenth Amendment, it is a factor when considering the extent to which procedural safeguards are required. *Meachum v. Fano*, *supra*, 427 U. S. at 224; *Goss v. Lopez*, 419 U. S. 565, 575-76 (1975); *Board of Regents v. Roth*, 408 U. S. 564 (1972); *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole*, *supra*, 500 F. 2d at 928.

On the other hand the Board has a substantial interest in releasing a prisoner on parole at the appropriate time. Society suffers both when the prisoner is released before he is fully rehabilitated and when he is kept in prison beyond the time when all purposes of incarceration have been served. Thus, the Board has an interest in seeing that parole is neither granted nor denied on the basis of inaccurate information or an erroneous evaluation. The Board has additional interests. It must be concerned that the procedures adopted do not interfere with the security of the institution or undermine discipline of the prisoners. It must also be concerned about the increased administra-

tive burdens and costs occasioned by the procedural safeguards.

The task facing this court is to ascertain the minimal requirements of fundamental fairness by balancing the interests of the inmates in their statutorily granted expectation of meaningful consideration for parole and the interests of the state and society in the orderly administration of the parole system.

We agree with the district court that a parole decision is not a part of a criminal prosecution and the full panoply of rights due a defendant in such proceedings does not apply. *See, e. g., Franklin v. Shields*, 569 F. 2d 784, 800 (4th Cir. 1978) (en banc); *Haymes v. Regan*, 525 F. 2d 540 (2d Cir. 1975). *See also Wolff v. McDonnell*, *supra*, 418 U. S. at 556; *Morrissey v. Brewer*, *supra*, 408 U. S. at 482 n. 8. However, as to the precise procedural safeguards required by the due process clause, we agree completely with neither of the parties nor the district court. We find that the procedures currently employed by the Board are in certain respects constitutionally deficient but the procedures required by *Wolff v. McDonnell*, *supra*, need not be followed in all respects in parole decisions in state prisons. With the interests of the inmates and state in mind, we will now consider each of the procedural protections required by the district court.<sup>4</sup>

<sup>4</sup> We note that the procedural protections required by this opinion are applicable only to inmates who are eligible for parole. We do not discourage Nebraska from conducting annual record reviews for all prisoners, see Neb. Rev. Stat. § 83-192 (9), but this case only concerns those prisoners that are eligible for parole.



In its decision of October 21, 1977, the district court ordered that "[e]very inmate eligible for parole under Nebraska law must be afforded a formal parole hearing." At a minimum, once it is determined that an interest is protected by the due process clause, a hearing for the person affected is required. See *Wolff v. McDonnell*, *supra*, 418 U.S. at 557-58; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The inmates contend that the district court required that all inmates eligible for parole be given a formal parole hearing annually. Although the district court's opinion is arguably ambiguous on this point, we understand it to only require a formal parole hearing upon an inmate's first becoming eligible for parole. In any event, we hold that to comply with the due process clause the Board has to provide a formal parole hearing only when the inmate first becomes eligible for parole. Subsequent formal parole hearings need be held only in the discretion of the Board. We, of course, do not discourage the Board from offering more frequent formal parole hearings.

The second minimum requirement imposed by the district court concerns the notice to be given to the inmates. It provides that:

At least seventy-two hours prior to the scheduled time of the parole hearing each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the board, which notice shall also include a concise listing of the factors which may be considered in evaluating an inmate for discretionary parole.

This standard actually contains two separate requirements. Initially, we have no hesitation in deciding that the due process clause entitles the inmate to receive reasonable

written notice of the date and hour for the hearing. *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, 339 U.S. at 313. Under normal circumstances we believe that a minimum advance notice of 72 hours, as mandated by the district court, allows the prisoner a fair opportunity to prepare for his appearance before the Board. Thus, the current practice followed by the Board of posting notice of the hearing at the institution on the day of the hearing is constitutionally infirm.

We also agree with the district court that the notice of the hearing must be accompanied by a listing of the criteria governing the Board's parole decisions. It is only fair to apprise the inmates of the standards to which they must conform if they are to be released on parole. Moreover, the Board offers no justification for not providing this information to the inmates. See *Franklin v. Shields*, *supra*, 569 F.2d at 791-93; *Childs v. United States Board of Parole*, 371 F.Supp. 1246, 1247-48 (D.D.C.), *aff'd*, 511 F.2d 1270 (D.C. Cir. 1974) (no appeal taken on this point); *Cooley v. Sigler*, 381 F.Supp. 441, 444 (D. Minn. 1974). *Contra*, *Haymes v. Regan*, 525 F.2d 540 (2d Cir. 1975). Neb. Rev. Stat. § 83-1,114<sup>5</sup> lists the four reasons for which parole may be denied to an eligible prisoner. This section also provides 14 factors to be considered by the Board in making its decision of whether parole should be granted. We find that the statutory criteria are sufficiently specific to enable the inmate to prepare his presentation to the Board. See *Franklin v. Shields*, *supra*, 569 F.2d at 791-92. We reiterate that a

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<sup>5</sup> See note 3, *supra*.



list of the factors considered by the Board must accompany the notice of a hearing given to the prisoner, or preferably by posting the statutory criteria and guidelines in the institutions in a place or places where the inmates will have access to them.

The district court also found that to comply with the due process clause "[e]ach inmate for whom a parole hearing is scheduled must be allowed to appear in person before the Board to present evidence in support of his application subject to prison security considerations." In its memorandum opinion the district court held, in reliance on *Wolff v. McDonnell*, *supra*, that this standard included the right to call witnesses subject to prison security considerations and the need to keep the hearing within limits. We affirm only in part. Subject to prison security considerations an inmate must be allowed to appear in person before the Board and to present documentary evidence in support of his application for parole. *Wolff v. McDonnell*, *supra*; *Mullane v. Central Hanover Bank & Trust Co.*, *supra*. This means that in many cases it will be desirable for the Board to give the applicant sufficient notice to secure documentary evidence directed to the Board's function of predicting whether parole will be successful.

Under Nebraska law a prisoner has a right to be considered for parole on the basis of certain statutory specifications. To make this right effective a prisoner must be given the opportunity to personally appear before the Board to explain and amplify the information on which the Board will base its decision. The administrative inconvenience and cost of a personal hearing is not sufficient to deprive the prisoner of this right. Moreover, a per-

sonal hearing is also beneficial to the Board and society insofar as the reliability of parole decision-making is enhanced by personal hearings. However, in the absence of exceptional circumstances the prisoner does not have a constitutional right to call witnesses in his behalf in a formal parole hearing. Nevertheless, the Board in its discretion may permit the prisoner to call witnesses. In fact the record shows that currently the Board does allow a prisoner afforded a formal parole hearing to have witnesses. It follows from our holding that a prisoner does not have a constitutional right to confront and cross-examine adverse witnesses. See *Wolff v. McDonnell*, *supra*, 418 U. S. at 566-69.

The order of the district court decreed that "[a] record of the proceedings at the parole hearing must be maintained." It appears from the district court's reliance on *Wolff v. McDonnell*, *supra*, 418 U. S. at 565, in its memorandum opinion that this standard requires that a written record of the proceedings be maintained. Currently a record of the hearings is maintained by the Board in the form of tape recordings. We find that this method is constitutionally adequate provided that the recordings are of sufficient quality to enable the record to be reduced to writing.

The final requirement ordered by the district court is that "[w]ithin a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole." We affirm. Every circuit which has held that the due process clause is applicable to parole release determina-

tions has found that the parole board must inform the prisoner in writing of the reasons for denial of his application for parole. See *Franklin v. Shields, supra*; *United States ex rel. Richerson v. Wolff, supra*; *Childs v. United States Board of Parole, supra*; *United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, supra*. See also *Wolff v. McDonnell, supra*, 418 U. S. at 564-65.

We agree with the reasoning of the Second Circuit that for a statement of reasons to satisfy minimal due process requirements "detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based . . . ." *United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, supra*, 500 F.2d at 934. See *United States ex rel. Richerson v. Wolff, supra*; *Cooley v. Sigler, supra*, 381 F. Supp. at 443; *Candirini v. Attorney General*, 369 F. Supp. 1132, 1137 n.8 (E. D. N. Y. 1974). Cf. *Franklin v. Shields, supra*, 569 F.2d at 797-98 n.59, 801. The present practice of the Board is deficient in that an inmate is not informed as to the essential facts relied on by the Board in reaching its decision.

Providing a prisoner with the reasons for denial and the essential facts relied on will serve at least four purposes. Firstly, it will facilitate judicial review in those situations where it is allowed. Secondly, it will promote thought by the Board members and will compel them to cover the relevant points and eschew irrelevancies. Thirdly, it will promote the goal of rehabilitation by relieving the inmates' frustration by instructing them how

they might by improving their prison behavior or taking steps with respect to some other factor (e. g., prospective employment or housing), better their chances for release. In some situations a prisoner is not considered fit for parole because of a factor such as a long history of recidivism which the prisoner will not be able to remedy even if the Board states its reasons in writing. Nevertheless, a statement of reasons is important in those situations because it will show that the Board has not acted arbitrarily. Finally, by requiring the Board to state its reasons for denial a body of rules, principles and precedent which will promote consistency by the Board will be established. *United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, supra*, 500 F.2d at 929, 931-33; *Cooley v. Singler, supra*, 381 F. Supp. at 443. See also *Childs v. United States Board of Parole, supra*, 511 F.2d at 1281-84; *Mower v. Britton*, 504 F.2d 396, 398-99 (10th Cir. 1974); *King v. United States*, 492 F.2d 1337, 1340-42 and n.11 (7th Cir. 1974).

In summary, considering the Nebraska statutes governing parole and after weighing the interests of both the state and the prisoners, we conclude that as a minimum the due process clause of the Fourteenth Amendment requires the following: (1) Every inmate is to receive a formal parole hearing upon first becoming eligible for parole. Subsequent hearings are to be allowed in the discretion of the Board. (2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the Board in making its determination. (3) Subject to security considerations,

every inmate is allowed to appear in person before the Board and present documentary evidence in support of his application. In the absence of unusual circumstances an inmate does not have a constitutional right to call witnesses in his behalf. (4) A record of the proceedings which is capable of being reduced to writing must be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

The district court by its order of January 4, 1978, allowed an award of attorney fees of \$3,000, plus expenses of \$212.77, to be included as part of the taxation of costs against the Board under the provisions of 42 U.S.C. § 1988. We follow the ruling of this court in *Finney v. Hutto*, 548 F.2d 740, 742 (8th Cir.), *cert. granted*, 98 S.Ct. 295 (1977) (No. 76-1660), that the Eleventh Amendment does not prohibit an award of attorney fees under section 1988 against a state agency although it is not a named party to the lawsuit. The district court did not abuse its discretion in awarding fees to the inmates in this case. See *Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977). Accordingly, we affirm the award of attorney fees against the members of the Board in their official capacities.

The decision of the district court is affirmed in part, and reversed in part. The case is remanded to the district court which in turn should remand to the Board of Parole for the purpose of drawing up regulations implementing the guidelines set out in this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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NOTATION AS TO OPINION OF THE  
DISTRICT COURT

The Memorandum Opinion of the United States District Court for the District of Nebraska, filed October 21, 1977, is not printed herein, but may be found on pages 24 to 48 of the Appendix to the Petition for Certiorari filed herein.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

CIV. 72-L-335

INMATES OF THE NEBRASKA PENAL COMPLEX,  
*Plaintiffs,*

vs.

JOHN B. GREENHOLTZ, et al.,  
*Defendants.*

AMENDED COMPLAINT

I.

JURISDICTION

This action arises under the United States Constitution and particularly the provisions of the Fourteenth Amendment to the Constitution of the United States and under federal law, particularly the Civil Rights Act, Title 42 of the United States Code, Section 1983.



This Court has jurisdiction of this cause under Title 28 of the United States Code, Section 1343.

## II.

Plaintiffs are citizens of the United States of America and are prisoners at the Nebraska Penal Complex.

## III.

Defendants are residents of the State of Nebraska and are duly appointed, employed and acting under the color of state law as members of the State of Nebraska Board of Parole.

## IV.

Plaintiffs' actions is brought by designated class representatives, Richard C. Walker, William Randolph, Richard J. Leary, and Robert Gamron, who, as inmates at the Nebraska Penal Complex, are members of the class and whose claims are typical of the claims of all the members of the class; such individuals are entitled to, and will, fairly and adequately protect the interest of all persons who are or may become members of the class.

The number of class members is so numerous as to make it impracticable to bring them all before the Court.

## V.

Defendants, acting as the Board of Parole, and pursuant to state law, particularly Neb. Rev. Stat. § 83-192, periodically review the records of class members and make determinations regarding the release of class members from confinement on either parole or work release.

## VI.

Defendants, in performing their duties as members of the Board of Parole, fail to:

- (a) inform the class members of the criteria which they must meet to obtain release on parole or work release;
- (b) inform the class members in advance of the date and time of their hearings before the Board of Parole;
- (c) permit members of the class to present evidence and call witnesses in their own behalf;
- (d) confront the class members with evidence presented opposing the class member's release on parole or work release;
- (e) permit the class members to cross-examine witnesses appearing before the Board of Parole in opposition to the class member's release on parole or work release;
- (f) maintain a complete and permanent record of all proceedings held in considering the release of class members on parole or work release;
- (g) permit full representation of class members by legal counsel in the proceedings had by the Board of Parole and provide such counsel upon a showing of indigent status;
- (h) provide class members denied parole or work release with specific written reasons why such parole or work release was denied;
- (i) inform class members denied parole or work release of the evidence relied upon in reaching its decision to deny work release or parole.



## VII.

The conduct of defendants has deprived, and continues to deprive, plaintiffs of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, plaintiffs pray that an order be entered requiring the defendants to:

- (a) inform the class members of the criteria which they must meet to obtain release on parole or work release;
- (b) inform the class members in advance of the date and time of their hearings before the Board of Parole;
- (c) permit members of the class to present evidence and call witnesses in their own behalf;
- (d) confront the class members with evidence presented opposing the class member's release on parole or work release;
- (e) permit the class members to cross-examine witnesses appearing before the Board of Parole in opposition to the class member's release on parole or work release;
- (f) maintain a complete and permanent record of all proceedings held in considering the release of class members on parole or work release;
- (g) permit full representation of class members by legal counsel in the proceedings had by the Board of Parole and provide such counsel upon a showing of indigent status;
- (h) provide class members denied parole or work release with specific written reasons why such parole or work release was denied;

- (i) inform class members denied parole or work release of the evidence relied upon in reaching its decision to deny work release or parole;
- (j) establish a procedure by which individual class members who have sustained damages as a consequence of the unlawful actions alleged herein may be identified and their damages proved, and to grant to such persons monetary damages for the unlawful deprivation of their constitutional rights by the defendants.

Inmates of the Nebraska Penal Complex, Plaintiffs,

By: Nelson, Harding, Marchetti,  
Leonard & Tate and Brian  
Ridenour

P. O. Box 82028  
Lincoln, Nebraska 68501  
(402) 475-6761

Attorneys for Class of  
Persons Alleging Denial  
Due Process

By: /s/ Brian Ridenour  
One of Said Attorneys

(CERTIFICATE OF SERVICE OMITTED  
IN PRINTING)

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### ANSWER TO AMENDED COMPLAINT

Come now the defendants herein and for answer to the amended complaint filed by the class of inmates who claim to have been denied due process of law in the parole procedures, show:

1. Defendants admit the allegations of paragraphs 2, 3, and 5 of said amended complaint.

2. Defendants deny each and every other allegation of said amended complaint, and specifically deny that in the conduct of their hearings defendants violate any of plaintiffs' constitutional rights, or deny them due process of law.

WHEREFORE defendants pray that the amended complaint filed herein be denied and dismissed.

John B. Greenholtz, et al.,  
Defendants

By: Paul L. Douglas  
Attorney General

By: /s/ Ralph H. Gillan  
Ralph H. Gillan  
Assistant Attorney General

2115 State Capitol  
Lincoln, Nebraska 68509  
Tel: (402) 471-2682  
Attorneys for Defendants

(CERTIFICATE OF SERVICE OMITTED  
IN PRINTING)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

CIV. 72-L-335

INMATES OF THE NEBRASKA PENAL AND  
CORRECTIONAL COMPLEX,  
*Plaintiffs,*

vs.

JOHN B. GREENHOLTZ, Individually, and as Chairman,  
Nebraska Board of Paroles, et al.,  
*Defendants.*

STIPULATION OF FACTS

The parties hereto, by and through their respective attorneys, hereby stipulate and agree to the following facts:

1. Discretionary parole, as used by the Nebraska Board of Parole, is a release on parole by virtue of an exercise of discretion on the part of the Board of Parole, such release occurring prior to expiration of the maximum term of imprisonment imposed by the sentencing court.

2. An inmate becomes eligible for release on discretionary parole upon completion of his minimum term of confinement less any deductions therefrom for good behavior. In the case of an inmate serving concurrent sentences, his eligibility date for release on parole as to each such sentence is determined separately and the later of such dates applies. In case of an inmate serving consecutive sentences, he becomes eligible for parole upon completion of the total of the minimum terms less any reductions as specified above.

3. In the event a definite term of years is imposed by the sentencing court, the inmate becomes eligible for discretionary parole upon completion of the minimum sentence provided by law less any reductions as specified herein above.

4. An inmate may be released on discretionary parole, with the approval of the sentencing judge, prior to completion of the court-imposed minimum sentence.

5. A parole review hearing is a periodic hearing granted by the Parole Board to all inmates regardless of their eligibility for release on discretionary parole.

6. A parole hearing is a hearing held by the Parole Board to determine whether an inmate eligible for discretionary parole should in fact be granted parole. Such hearings are set by the Parole Board following a parole review hearing.

7. Work release is a release of an inmate by the Director of Correctional Services, upon recommendation of the Parole Board, to permit the inmate to engage in work or paid employment in the community. Such release may occur either by extension of the limits of the inmate's confinement or release from the facilities for prescribed periods of time. Hearings are not held by the Parole Board prior to determination of what recommendation should be made regarding an inmate's release on work release.

8. Inmates at the Nebraska Penal Complex are advised of the approximate date of parole review hearings and parole hearings but they are not advised by the Parole Board as to the exact time and date. Such notification of the approximate time is given at the time of initial imprisonment in the Nebraska Penal Complex or at subsequent parole review hearings. Such notification specifies the month when the next parole review hearing will be held for such inmate. Notification of the exact time and date occurs by the posting of such information at the Nebraska Penal Complex on the date of such hearing.

9. After a parole review hearing an inmate eligible for parole will either be set for a parole hearing or deferred for a future parole review hearing. In the event

of deferral for a future parole review hearing, Form PB-1, a copy of which is attached hereto, is delivered to the inmate. If, after a parole review hearing, the inmate is set for a parole hearing, Form PB-2, a copy of which is attached hereto, is delivered to such inmate.

10. Notification by means of PB-1 of the next parole review hearing occurs from 30 days to one year in advance of such review hearing. Such notification specifies only the month of such parole review hearing. Notification by means of PB-2 of a parole hearing occurs at least 30 days in advance of such parole hearing and specifies only the month of such hearing.

11. Inmates at parole review hearings are not permitted to present evidence or call witnesses in their own behalf. Inmates are permitted at parole hearings to present evidence and call witnesses.

12. At parole hearings the Parole Board may receive evidence of either a testimonial or documentary nature opposing the inmates release on discretionary parole. The inmate is excluded from the hearing room at the time such evidence is received. The inmate is informed that there is opposition to his parole but is not informed of the specific evidence received or allowed to examine any documentary evidence received. Inmates are not permitted to cross-examine witnesses appearing in opposition to the granting of parole.

13. Records of all parole review hearings and parole hearings are maintained in the form of tape recordings of such hearings. Inmates are permitted to be represented by legal counsel provided by such inmates at parole hearings. The Parole Board does not provide indigent in-



mates with legal counsel for parole review hearings or parole hearings.

14. Inmates denied parole following a parole hearing are provided with a letter notifying the inmate of such denial.

15. Written notification to an inmate following a parole review hearing that he is being deferred for reconsideration at a subsequent parole review hearing occurs through use of Form PB-1.

16. Inmates deferred for reconsideration at a subsequent parole review hearing or denied parole following a parole hearing are not advised of the specific evidence relied upon by the Board in reaching its determination.

INMATES OF THE NEBRASKA PENAL  
AND CORRECTIONAL COMPLEX,  
Plaintiffs,

BY: NELSON, HARDING, YEUTTER  
LEONARD & TATE and  
BRIAN RIDENOUR

P. O. Box 82028  
Lincoln, Nebraska 68501

By /s/ BRIAN RIDENOUR  
One of Said Attorneys

JOHN B. GREENHOLTZ, et al.,  
Defendants

BY: PAUL L. DOUGLAS,  
Attorney General of Nebraska

By /s/ RALPH H. GILLAN  
Assistant Attorney General

2115 State Capitol  
Lincoln, Nebraska 68509  
Telephone: (402) 471-2682

Attorneys for Defendant

## STATE OF NEBRASKA BOARD OF PAROLE

### Case and Record Review

NAME: \_\_\_\_\_ NUMBER: \_\_\_\_\_ DATE: \_\_\_\_\_  
OFFENSE: \_\_\_\_\_ SENTENCE: \_\_\_\_\_

In accordance with LB 524 relating to the Board of Parole and in compliance with Section 83-1,111 of the Revised Statutes 1972 Supplement, the Board of Parole reviewed your record in your presence. After careful evaluation and in executive session, the Board, by majority vote, deferred your case until \_\_\_\_\_ for the following reasons.

- \_\_\_\_\_a. Your continued correctional treatment, vocational, educational, or job assignment in the facility will substantially enhance your capacity to lead a law-abiding life when released at a later date.
- \_\_\_\_\_b. Because of your negative attitude and actions toward rules, regulations and authority, your early release would have a substantially adverse effect on institutional discipline.
- \_\_\_\_\_c. Your prior criminal record, including the nature and circumstances of the offenses, indicate that an early release would depreciate the seriousness of your crime and would promote disrespect for the law.
- \_\_\_\_\_d. Because of your past use of narcotics and alcohol, there is a substantial risk that you would not conform to the conditions of parole.
- \_\_\_\_\_e. Because of your past violations of parole and/or probation, there is a substantial risk that you would not conform to the conditions of parole.
- \_\_\_\_\_f. OTHER: \_\_\_\_\_

RECOMMENDATIONS FOR CORRECTING  
DEFICIENCIES:



- 1. Maintain a good institutional record of work, conduct, attitude and stability.
- 2. Participate in programs designed for self-improvement such as skill training, education, Vocational Rehabilitation, etc.
- 3. Obtain and maintain good institutional progress reports.
- 4. Exhibit some responsibility and maturity.
- 5. Obtain no charge of misconduct or disciplinary reports for at least six months prior to Board review or hearing.
- 6. Formulate attainable goals for future community citizenship.

#### BOARD OF PAROLE—Nebraska

\_\_\_\_\_  
Chairman

#### DISTRIBUTION:

White—Offender  
Yellow—Parole Board  
Pink—Records Office

#### BOARD OF PAROLE STATE OF NEBRASKA

#### PAROLE BOARD CASE AND RECORD REVIEW

To: \_\_\_\_\_ NO. \_\_\_\_\_ DATE \_\_\_\_\_  
OFFENSE \_\_\_\_\_ SENTENCE \_\_\_\_\_  
TIME SERVED \_\_\_\_\_

In accordance with LB 524, relating to the Board of Parole and in compliance with amendments in Section 83-1,111, Revised Statutes Supplement, 1972, the Board of Parole reviewed your record in your presence. After careful evaluation and in executive session, the Board by majority vote set your case for final hearing on \_\_\_\_\_

The Board will require that you continue to maintain a good institutional record free of any misconduct or poor progress reports in order to enhance and justify favorable Board action.

If released on parole, the Board will require as a condition of your parole that you refrain from engaging in criminal conduct and conform to any of the following conditions of parole as set forth in the parole agreement:

- (A) Meet your specified family responsibilities.
- (B) Devote yourself to an approved employment.
- (C) Remain in the geographic limits fixed in your certificate of parole, unless granted written permission to leave.
- (D) Report as directed to your district parole officer.
- (E) Reside at the place fixed in your certificate of parole and notify your district parole officer of any changes in your address or employment.
- (F) Refrain from associating with persons known to you to be engaged in criminal activities.
- (G) Satisfy any other conditions specially related to the cause of your offense.

#### BOARD OF PAROLE—NEBRASKA

\_\_\_\_\_  
Chairman

#### Distribution:

White—Offender  
Yellow—Parole Board  
Pink—Records Office

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 72-L-335

INMATES OF THE NEBRASKA PENAL AND  
CORRECTIONAL COMPLEX,

*Plaintiffs,*

vs.

JOHN B. GREENHOLTZ, Individually and as Chairman,  
NEBRASKA BOARD OF PAROLE, et al.,

*Defendants.*

ORDER

(Filed October 21, 1977)

Pursuant to the memorandum opinion filed herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants will implement and put into effect within sixty (60) days from this date procedures which will safeguard the due process rights of the plaintiff class, including at a minimum the following:

(1) Every inmate eligible for parole under Nebraska law must be afforded a formal parole hearing;

(2) At least seventy-two hours prior to the scheduled time of the parole hearing each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the board, which notice shall also include a concise listing of the factors which may be considered in evaluating an inmate for discretionary parole.

(3) Each inmate for whom a parole hearing is scheduled must be allowed to appear in person before the Board to present evidence in support of his application subject to prison security considerations.

(4) A record of the proceedings at the parole hearing must be maintained.

(5) Within a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole.

IT IS FURTHER ORDERED that plaintiffs' claim that their constitutional right to due process in consideration of eligibility for work release is dismissed.

IT IS FURTHER ORDERED that the plaintiffs shall not recover any money damages in this action, but that plaintiffs may recover their costs as provided by law, including a reasonable attorney fee, the amount of which shall be agreed upon by the parties, or if the parties are unable to agree upon an amount, in an amount to be determined by the court upon the application of the parties.

BY THE COURT:

/s/ Albert G. Schatz

Judge, United States District Court

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UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 77-1889

September Term, 1977

Inmates of the Nebraska Penal and Correctional Complex,  
Richard C. Walker, William Randolph, Richard J. Leary,  
Robert L. Gamron, Frederick L. Grant, Wayne Goham and  
Charles LaPlante,

*Appellees,*

vs.

John B. Greenholtz, Individually, and as Chairman, Nebraska Board of Parole; Eugene E. Neal, Catherine R. Dahlquist, Marshall M. Tate, and Edward M. Rowley,

*Appellants.*

## JUDGMENT

(Filed May 18, 1978)

APPEAL FROM the United States District Court  
for the ——— District of Nebraska.

THIS CAUSE came on to be heard on the original  
designated record of the United States District Court for  
the ——— District of Nebraska and briefs of the respec-  
tive parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here  
ordered and adjudged by this Court, that the judgment of  
the said District Court, in this cause, be, and the same is  
hereby, affirmed in part and reversed in part.

And it is further ordered by this Court that this cause  
be and is hereby remanded to the said District Court for  
the proceedings consistent with the opinion of this Court.

May 18, 1978

## EXHIBIT 10

(UNITED STATES DISTRICT COURT)

DEFERRALS

October 1976-March 1977

## SUMMARY

*Definitions: Reasons*

- a. Your continued correctional treatment, vocational, edu-  
cational, or job assignment in the facility will sub-  
stantially enhance your capacity to lead a law-abiding  
life when released at a later date.

- b. Because of your negative attitude and actions toward  
rules, regulations and authority, your early release  
would have a substantially adverse effect on institu-  
tional discipline.
- c. Your prior criminal record, including the nature and  
circumstances of the offenses, indicates that an early  
release would depreciate the seriousness of your crime  
and would promote disrespect for the law.
- d. Because of your past use of narcotics and alcohol,  
there is a substantial risk that you would not conform  
to the conditions of parole.
- e. Because of your past violations of parole and/or pro-  
bation, there is a substantial risk that you would not  
conform to the conditions of parole.
- f. Other.

*Definitions: Recommendations for Correcting Deficiencies*

1. Maintain a good institutional record of work, conduct,  
attitude and stability.
2. Participate in programs designed for self-improve-  
ment such as skill training, education, Vocational Re-  
habilitation, etc.
3. Obtain and maintain good institutional progress re-  
ports.
4. Exhibit some responsibility and maturity.
5. Obtain no charge of misconduct or disciplinary re-  
ports for at least six months prior to Board review or  
hearing.
6. Formulate attainable goals for future community  
citizenship.

<u>Reasons</u>	<u>Number</u>
a	285
a, b	13
a, b, c	4
a, b, c, d, e	1
a, b, d	3
a, b, d, e, f	1
a, b, d, f	1
a, b, e	1
a, b, f	2
a, c	19
a, c, d	7
a, c, d, e	4
a, c, e	2
a, c, f	2
a, d	7
a, d, e	5
a, d, e, f	1
a, d, f	1
a, e	4
a, f	6
f	6
Total:	375

<u>Recommendations</u>	<u>Number</u>
1-6	370
NONE	5
Total:	375

OCTOBER 1976

<u>Reasons</u>	<u>Number</u>
a	13
a, b	1
a, b, c	1
a, b, d	1
a, b, d, e, f	1

<u>Reasons</u>	<u>Number</u>
a, b, f	1
a, c	4
a, c, d	1
a, d	2
a, d, e	1
a, d, e, f	1
a, f	1
f	1
Total:	29

NOVEMBER 1976

a	51
a, b, c	1
a, c	2
a, c, d	1
a, f	2
f	1
Total:	58

DECEMBER 1976

a	41
a, b	6
a, b, c	1
a, b, c, d, e	1
a, b, e	1
a, b, f	1
a, c	3
a, c, d	2
a, c, d, e	3
a, c, f	1
a, d	1
a, d, e	1
a, e	2
a, f	2
Total:	66



JANUARY 1977

<u>Reasons</u>	<u>Number</u>
a	58
a, b	1
a, b, d	1
a, b, d, f	1
a, c	5
a, c, d	1
a, c, e	1
a, d	3
a, d, e	1
a, d, f	1
f	2

Total: 75

FEBRUARY 1977

a	53
a, b	2
a, c	2
a, c, e	1
a, d	1
a, e	2
a, f	1
f	2

Total: 64

MARCH 1977

a	69
a, b	3
a, b, c	1
a, b, d	1
a, c	3
a, c, d	2
a, c, d, e	1
a, c, f	1
a, d	2

Total: 83

TOTAL: October 1976-March 1977: 375

## EXHIBIT 11

(UNITED STATES DISTRICT COURT)

## SUMMARY OF REASONS

## GIVEN FOR DENIALS

January, 1975-November, 1976

<u>Reason</u>	<u>Number</u>
Disciplinary Report	46
NONE	8
Removal from Work Release	5
Pending Charges	3
Conviction of Additional Offense	2
Attitude and Conduct	2
Violation of Post Care Rules (Rescissions of Unexecuted Paroles)	2
Not Eligible	1
Request of Inmate	1
Non-acceptance by Another State for Parole Supervision	1
Actions on Work Release	1
Escape from Work Release	1
Leaving State while on Parole	1
Failure to Obtain Employment	1
Failure to Complete Skill Training	1
Short Period of Time on Educational Release	1
Lacking of Approved Parole Program	1
Continued Correctional Treatment or Vocational Training Needed	1
Substantial Risk of Noncompliance with Conditions of Parole	1
Depreciate Seriousness of Crime	1
Total:	81